

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JUSTIN M. MULLIS,

Plaintiff

v.

OFFICER RICK MOORE,

Defendant

Case No.: 3:22-cv-00428-CSD

Order

Re: ECF Nos. 2, 2-1

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 2) and pro se complaint (ECF No. 2-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

1 An inmate submitting an application to proceed IFP must also “submit a certificate from
2 the institution certifying the amount of funds currently held in the applicant’s trust account at the
3 institution and the net deposits in the applicant’s account for the six months prior to the date of
4 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
5 at the institution for less than six months, “the certificate must show the account’s activity for
6 this shortened period.” LSR 1-2.

7 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
8 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
9 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
10 deposits or the average monthly balance for the six-month period immediately preceding the
11 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
12 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
13 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
14 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
15 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

16 Plaintiff’s certified account statement indicates that his average monthly balance for the
17 last six months was \$50.10, and his average monthly deposits were \$50.10.

18 Plaintiff’s application to proceed IFP is granted. Plaintiff is required to pay an initial
19 partial filing fee in the amount of \$10.02 (20 percent of \$50.10). Thereafter, whenever his prison
20 account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
21 preceding month’s income credited to his account until the \$350 filing fee is paid.

II. SCREENING

A. Standard

Under the statute governing IFP proceedings, “the court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

In addition, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a complaint under these statutes, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,

1 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
2 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
3 (1980) (internal quotation marks and citation omitted).

4 A complaint must contain more than a “formulaic recitation of the elements of a cause of
5 action,” it must contain factual allegations sufficient to “raise a right to relief above the
6 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
7 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
8 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
9 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
10 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

15 **B. Plaintiff’s Complaint**

16 From the allegations in the complaint, it appears Plaintiff was either an arrestee or
17 detainee in the Elko County Jail. He alleges that while he was in the interview room and
18 handcuffed on the floor, Plaintiff said he was going to stand up to sit in a chair. Officer Moore
19 got in his face and said, “you’re not doing jack shit, you’re going to sit right there.” Officer
20 Moore then began to hit and pull Plaintiff around by his hair.

21 Plaintiff states a colorable claim for excessive force under either the Fourth (arrestee) or
22 Fourteenth (detainee) Amendments. *See Graham v. Connor*, 490 U.S. 386, 395, n. 10 (1989);
23 *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015).

III. CONCLUSION

(1) Plaintiff's IFP application (ECF No. 2) is **GRANTED**; however, within **30 DAYS** Plaintiff must pay, through Elko County Jail (or any subsequent facility), an initial partial filing fee in the amount of \$10.02. Thereafter, whenever his prison account exceeds \$10, he is required to make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk must **SEND** a copy of this Order to the attention of **Chief of Inmate Services for the Elko County Jail**, 775 W. Silver Street, Elko, NV 89801.

(2) The Clerk will **FILE** the complaint (ECF No. 2-1).

(3) The Complaint will **PROCEED** with the excessive force claim against Officer Rick Moore.

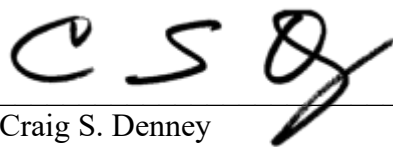
(4) The Clerk of Court shall **ISSUE** a summons for defendant Rick Moore, **and deliver the same**, to the U.S. Marshal for service. The Clerk also shall **SEND** a copy of the complaint (ECF No. 2) and this Order to the U.S. Marshal for service on the defendant. The Clerk shall **SEND** to Plaintiff **1** USM-285 form. Plaintiff has **21 days** to furnish to the U.S. Marshal the required USM-285 form with relevant information for the defendant on the form at 400 S. Virginia Street, 2nd floor, Reno, Nevada 89501. Within **20 days** after receiving from the U.S. Marshal a copy of the USM-285 forms showing whether service has been accomplished, if the defendant was not served, and if Plaintiff wants service to be attempted again, he must file a motion with the court providing a more detailed name and/or address for service, or indicating that some other method of service should be attempted.

1 (5) Plaintiff is reminded that under Federal Rule of Civil Procedure 4(m), service must
2 be completed within **90 days** of the date of this Order. If Plaintiff requires additional time to
3 meet any of the deadlines set by the court, he must file a motion for extension of time under
4 Local Rule 1A 6-1 *before* the expiration of the deadline, and the motion must be supported by a
5 showing of good cause. A motion filed after a deadline set by the court or applicable rules will
6 be denied absent a showing of excusable neglect.

7 (6) Once a defendant is served, Plaintiff must serve a copy of every pleading or other
8 document submitted for consideration by the court upon the defendant or, if an appearance has
9 been entered by counsel, upon the attorney. Plaintiff must include with the original of each
10 document to be filed with the court a certificate stating that a true and correct copy of the
11 document was served on the defendant, or counsel, if the defendant has an attorney. Under Local
12 Rule 5-1 the proof of service must show the day and manner of service and the name of the
13 person served. The court may disregard any paper received which has not been filed with the
14 Clerk, or that fails to include a certificate of service.

15 **IT IS SO ORDERED.**

16
17 Dated: January 31, 2023

18 
19 Craig S. Denney
20 United States Magistrate Judge
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